IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 15TH DECEMBER 2006 / 24TH AGRAHAYANA 1928

CRL.A.No. 2023 of 2005()

AGAINST THE ORDER IN CRLP.678/2005 Dated 22/11/2005
CC.574/2003 of JUDL. MAGISTRATE OF FIRST CLASS, ERATTUPETTA

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APPELLANT: CCOMPLAINANT

K.G.SIVADAS,
KAIPPANAPPALLIL HOUSE, POONJAR P.O.,
KOTTAYAM DISTRICT.

BY ADV. SRI.SHAJI THOMAS PORKKATTIL

RESPONDENTS: ACCUSED & STATE

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1. A.C.AJIKUMAR,
AMBAZHATHINALKUNNAL HOUSE,
POONJAR P.O., PIN-686 581.

2. STATE, REPRESENTED BY ITS
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

R2- BY P.P.SRI.PUZHAKKARA MUHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

Crl.A.No. 2023 OF 2005

Dated this the 15th day of December, 2006.

J U D G M E N T

Appellant is the complainant in C.C.No.574/2003 on the file of the Judicial Magistrate of First Class, Erattupetta. The complaint is filed against the 1st respondent alleging that he had committed an offence punishable under Section 138 of the N.I.Act, 1881. As per the complaint, it is stated that, the 1st respondent had borrowed an amount of Rs.20,500/= from the appellant and in discharge of the above debt, the 1st respondent had issued cheque No.301194 drawn on the Catholic Syrian Bank, Pala Branch. When the cheque was Presented for encashment, the same was dishonoured on the ground of insufficiency of fund with the account of the 1st respondent. On getting intimation from the Bank of the appellant and on issuing notice to the 1st respondent, the complaint has been filed before the court. The trial court had taken cognisance of the compliant and summons was issued to the 1st respondent. The 1st respondent appeared before the court and the case was posted for trial on 10.10.2005. On

10.10.2005 the trial court acquitted the 1st respondent under Section 256 (1) of the Cr.P.C on the ground of absence of the appellant on that day before the court. This Court had granted special leave and the appeal filed. Notice was served on the 1st respondent but, there is no appearance for him before this court. This Court heard the learned counsel appearing for the appellant. The learned counsel submits that the order under challenge requires interference by this Court as the trial court had not followed the principles laid down by this Court in the judgment reported in **Don Bosco v. Partech Computers Ltd** (2005 (2) KLT 1003) and **G.F.S. Chit & Loans (P) Ltd v. Rajesh** (2006(3) KLT 825). The learned counsel further submits that the appellant was regularly appearing before the court and eagerly prosecuting the complaint against the 1st respondent. But, on 10.10.2005 the appellant could not appear before the court as he had gone out of station and the absence of the appellant was also informed by the counsel appearing for the appellant before the court below and applied for excuse of the absence of the appellant. However, the trial court did not consider the application filed by the appellant for excusing his non

appearance before the court.

2. A reading of the order impugned would show that the case was posted for evidence with a precaution that no further time will be allowed. Only because of that noting, the trial court acquitted the 1st respondent by passing the order under Section 256(1) or Cr.P.C. As per the principles laid down in **Don Bosco's Case** (cited supra) the court shall not have used its discretion to acquit an accused in a circumstance under which the court did not state the reasons for the presence of the complainant before the court on the posting date of the case. Further, as per the dictum laid down in **G.F.S Chit's case** the Court shall not pass any half minded order and the order should show that the court have applied its mind. That apart, this Court is of the view that once the appellant had filed an application for excusing his absence, the court should record the same and to state the reasons for not allowing the application so filed.

In the above circumstances, this Court is of the view that the order under challenge has to be set aside and the court below has to take back the case and dispose of the same as

per law. Consequently, this appeal is allowed. The judgment is set aside and the trial court is directed to take back C.C.No.574/2003 on file and dispose of the same as per law on issuing fresh notice to the 1st respondent. The appellant shall appear before the court below on 20.01.2007.

K. THANKAPPAN, JUDGE.

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